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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EDNA AQUINO,

Plaintiff and Appellant,

v.

CRUCERO USA, LLC,

Defendant and Respondent.

D053408

(Super. Ct. No. GIC880540)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed.

This action arises out of an accident in which Edna Aquino, who was crossing a street in downtown San Diego, was hit by a bus driven by Crucero USA, LLC's (Crucero) employee, Bryan Cuevas. Aquino appeals from a jury verdict finding Crucero was not negligent.

On appeal Aquino challenges the admissibility of several items of evidence. First, Aquino asserts the court should have excluded the expert opinion of the investigating

police officer because the investigating officer was not designated as an expert witness. Aquino also asserts that even if he had been designated as an expert, his opinion was improper because (1) it lacked foundation as it was not based upon his personal observations; (2) he was not competent to render an opinion that Aquino violated the law; (3) he could not testify as to the cause of the accident; and (4) his opinion was based upon inadmissible hearsay statements made by a witness. Aquino also contends the court erred by allowing the investigating officer to testify from the accident report and allowing him to use statements and diagrams from that report. Finally, Aquino asserts the court abused its discretion by allowing remote, irrelevant and prejudicial testimony concerning a 10-year-old traffic accident. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Accident*

The bus involved in the incident was being driven by Bryan Cuevas. Cuevas began the trip in Tijuana and was headed to the bus station in San Diego when the accident occurred at the intersection of Elm Street and Fourth Avenue.

Elm Street is a one-way street with three lanes, running east to west. Fourth Avenue is also a one-way street with three lanes, running north to south. The bus was turning south onto Fourth from westbound Elm at the time of the incident. Aquino was walking west on the south side of Elm, and the incident occurred after she stepped off the curb on the southeast corner of the intersection of Elm and Fourth. Witnesses to the accident gave different versions of what occurred, as described in more detail, *post*.

1. *Bus Driver Cuevas*

Cuevas was familiar with the intersection, as it was a regular part of his route. On the day of the accident, he approached Fourth Avenue from the left-hand lane on Elm Street. When he came to Fourth Avenue, the traffic light was red, and Cuevas brought the bus to a stop behind two cars in his lane. When the light turned green, the two cars continued through the intersection, and Cuevas pulled the bus forward, preparing to turn left.

When he got to the limit line, the traffic signal was green, and Cuevas proceeded into the intersection in order to turn left into the middle lane on Fourth Avenue. Because of the size of the bus, the bus had to turn into the middle lane rather than the left lane. As he pulled into the intersection, Cuevas stopped for one or two pedestrians who were crossing Elm Street from west to east, and he waited for them to step up onto the curb (on the same side of the street from which Aquino subsequently began crossing) before he continued his turn. Cuevas was able to see the pedestrians step onto the curb by looking out his left window. He did not observe any other persons at the corner.

Cuevas did not see any other pedestrians crossing the street after the one or two pedestrians completed crossing, so he started to complete his left turn onto Fourth Avenue. As Cuevas began completing his turn, he heard a passenger on the bus scream. He felt and heard something hit the bus, and he stopped the bus in the middle of the turn. He got out of the bus and saw Aquino sitting beside the front bumper of the bus, bleeding and crying, and he assisted her to the side of the road.

Cuevas testified that his foot is always on the brake while turning so he is ready to stop the bus immediately if it is necessary. He was in a position to brake when the incident occurred, although he was not braking at the time.

2. *Davian Thompson*

Davian Thompson was driving with her two children at the time of the accident.¹ She was traveling south on Fourth Avenue and was stopped for a traffic light in the right most lane at the corner of Fourth and Elm. No cars were in front of her at the light. Thompson was stopped at the light for approximately 30 seconds before she became aware that something was happening on the other side of the street.

Thompson testified that Aquino was looking at the bus and stepping on and off the curb. According to Thompson, the light crossing Elm Street was yellow and about to turn red when Aquino "darted" into the street as the bus was coming and was hit. The bus was already moving when Aquino "darted out" into the street in front of it.

Thompson testified that Aquino was not in the crosswalk at the time of the collision:

"Q. Was she in - was there a crosswalk there?

"A. Yes, there was.

"Q. Was she in the crosswalk?

"A. No, she wasn't.

"Q. Was she south of the crosswalk?

"A. Yes.

¹ Because Thompson was not available as a witness at the time of trial, her testimony came from her deposition taken prior to trial.

"Q. How far south of the crosswalk?

"A. Maybe about four feet."

After Aquino "jumped" off the curb and started crossing, Thompson's view was blocked and she could not see Aquino until she saw Aquino get hit. She testified that Aquino was hit near the front right headlight of the bus and that she was facing the bus when it hit her. According to Thompson, Aquino was "attached" to the bus as the bus moved forward before she fell off. After the incident, Thompson stopped to render assistance.

When police arrived, Thompson reported to them what she had witnessed.

3. *Passenger Angelica Orozco*

Angelica Orozco was a passenger on the bus, seated on the left side about two-thirds of the way toward the back, in a window seat.² Orozco testified that the bus made a stop and then pulled slowly forward. As the bus pulled forward, she saw Aquino was walking, bent over. According to Orozco, the bus entered the intersection before Aquino stepped off the curb. Aquino did not stop at the corner, but continued walking from the sidewalk into the intersection without stopping.

Orozco screamed when she saw there was going to be contact between Aquino and the bus. The bus driver then applied the brakes. She did not actually see Aquino get hit.

² Orozco was also unavailable as a witness at trial, and her testimony also came from her deposition.

4. Lisa Mendoza

Lisa Mendoza is the manager of Hotel Occidental at the northeast corner of Fourth and Elm. Mendoza testified that she was standing on the porch of the hotel at the time of the incident and that she witnessed the incident from the porch. However, prior to trial Mendoza signed a declaration in which she stated that she was in the lobby of the hotel at the time of the accident.

Mendoza testified that she was at the top of the stairs and had a "bird's eye view" of the street from the porch. Mendoza testified that she saw Aquino walking on the south side of Elm Street toward Fourth Avenue, and she also saw the bus heading down Elm Street toward Fourth Avenue. According to Mendoza, Aquino stepped off the curb, and the bus approached the intersection and turned without stopping. Mendoza testified that the bus obstructed her view of Aquino as it turned into the intersection, and she did not see Aquino get hit.

Mendoza testified she called 911 when the accident occurred. However, she did not talk to the police who came to investigate the accident.

5. Patricia Stroud

Patricia Stroud was on her way home from school at the time of the incident. She had gotten off a bus at the corner of Fifth and Elm and was walking west on the north side of Elm heading toward Fourth. When she reached the corner of Elm and Fourth, she intended to cross Fourth, but stopped walking to wait for the traffic signal to turn to "walk." When she got to the intersection, the light was blinking "don't walk," so she did not cross because "this is a really busy street, and there's a lot of cars right there."

Stroud testified that while she was waiting for the light to change, she saw the bus. It was stopped at the intersection, getting ready to turn. Stroud stated that when she first saw Aquino, she was in the middle of the intersection and the signal was blinking "don't walk."

Stroud, who was walking on the north side of Elm heading west, testified that Aquino was walking "from the other end of the street,"

6. Officers Cordero and Odom

San Diego Police Officers Noe Cordero and Scotty Odom arrived at the scene to investigate the accident. They conferred in preparing the police report. Officer Cordero interviewed Aquino, Cuevas and Thompson. According to Officer Cordero, Thompson told him that Aquino "bolted" from the curb. Officer Odom also noted some road scuff (a white residue) in close proximity to the front of the bus.

Officers Cordero and Odom determined that the place where the bus came to rest (where it was when they arrived) was the initial contact point. Based upon his interviews with witnesses, measurements, and observations at the scene, Officer Cordero determined that Aquino was south of the crosswalk when she was struck. Over Aquino's objection, Officer Cordero also opined that Aquino was in violation of Vehicle Code section 21954, subdivision (a), because she was not in a crosswalk when she crossed the street.

The court then gave the jury the following limiting instruction: "The officer's determination that [Aquino] violated the Vehicle Code does not mean that she's at fault. He's not saying who is at fault for the accident."

7. Accident Reconstruction Expert Thomas Fugger

Crucero called an accident reconstruction expert, Thomas Fugger, who testified that the bus was traveling five to six miles per hour at the time of the accident.

According to Mr. Fugger, the most likely point of contact with the bus was the left front of the bus. However, he also testified Thompson's belief that the contact occurred at the right side of the front of the bus was also possible and was consistent with testimony that Aquino was crossing quickly.

Fugger disagreed with Thompson's testimony that Aquino was "attached" to the bus and then fell off. He explained that a bus would tend to push a person to the ground rather than taking them off their feet.

8. Human Factors Expert Carl Beels

Crucero's human factors expert, Carl Beels, opined Aquino stepped into the street on the "don't walk" phase of the traffic signal. The signal had a 13-second "walk" phase, following by a 12-second flashing "don't walk" phase, followed by a three-second yellow light at which time the flashing "don't walk" stops flashing and becomes a solid "don't walk."

Beels estimated that it took the pedestrian who was crossing west to east (the pedestrian for whom Cuevas waited) 19 to 20 seconds to cross. As Aquino did not step off the curb until the pedestrian had stepped onto the curb, the traffic signal had to be in the "don't walk" phase when Aquino stepped off the curb. This opinion was bolstered by the fact that Thompson testified that she had been sitting at the light for approximately 30

seconds before she saw something, indicating that the event occurred "at the very latest part of this [traffic signal] cycle."

Beels also opined that Cuevas would have been able to see the pedestrian step up onto the curb after crossing Fourth through the window of the bus and that nobody else was there at that time. He explained that Cuevas did not see Aquino step off the curb because she was neither in the street nor exhibiting crossing behavior at the time that Cuevas looked to his left for pedestrians. Aquino was not readily apparent to Cuevas. It was light enough outside and there is no reason that Aquino would have been difficult to see if she had been at the curb at the southeast corner. In fact, Cuevas was looking for pedestrians before completing his turn and would have seen Aquino if she had not darted out into the street in front of him.

B. Aquino's Motions in Limine

Aquino brought a motion in limine to exclude reference to a previous traffic accident in which she had been involved and also to exclude reference to Aquino's immigration status contained in medical records from that accident. Crucero opposed the motion, arguing that the previous accident was relevant to her credibility as she denied the existence of the prior accident during discovery and as that crash also involved head trauma. The court denied the motion as to evidence of her prior injuries and granted the motion as to evidence of her immigration status.

Aquino also brought a motion in limine to exclude the traffic collision report prepared by Officers Cordero and Odom, as well as the statements made by Thompson to the officers contained in that report. The court ruled the traffic report itself was hearsay

and inadmissible, but could be used to refresh the officers' recollection. Accordingly, the court denied Aquino's motion.

Further, pursuant to the Superior Court of San Diego County Local Rules, rule 2.1.18, motions in limine to exclude "experts not designated pursuant to section 2034 of Code of Civil Procedure" were "deemed granted."

DISCUSSION

I. FAILURE TO DESIGNATE OFFICER CORDERO AS AN EXPERT

A. Background

Officer Cordero was not designated as an expert witness. Rather, he was listed only as a percipient witness on the parties' pretrial joint witness list.

When Officer Cordero testified at trial, counsel for Aquino objected to his opinion testimony on three occasions. When Crucero's counsel asked Officer Cordero if he had determined the "initial contact area" of the accident, counsel objected, "Improper opinion. No foundation."

When Crucero's counsel questioned Officer Cordero about a diagram of the initial contact area, Aquino's counsel objected again on the basis of "No foundation.

Impermissible opinion." At a sidebar conference to discuss the objection, Crucero's counsel explained that Officer Cordero's determination of the point of impact was based upon his investigation, including statements of witnesses and measurements he made. The court overruled the objection. However, the court ruled Officer Cordero could not testify using the diagram contained in the police report unless it was necessary to refresh his recollection.

When counsel for Crucero questioned Officer Cordero whether, based upon his investigation, he had determined if Aquino had violated any provision of the Vehicle Code, counsel for Aquino objected, "Impermissible opinion." The court overruled the objection.

At no time during trial did counsel for Aquino object that Officer Cordero's testimony was improper because he had not been designated as an expert.

B. Standard of Review

We generally review the trial court's ruling on a motion to exclude an expert's opinion for abuse of discretion. (*Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476.) However, "discretion is always delimited by the statutes governing the particular issue." (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1107.)

C. Analysis

Code of Civil Procedure³ section 2034.210 provides that "any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses" The demand must be in writing (§ 2034.230, subd. (a)) and "specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings" (§ 2034.230, subd. (b).). On or before the date specified, all parties to the action must provide either "[a] list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial" (§ 2034.260, subd. (b)(1)) or "[a] statement that the party

³ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

does not presently intend to offer the testimony of any expert witness" (§ 2034.260, subd. (b)(2)).

Furthermore, "[w]ithin 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject." (§ 2034.280, subd. (a).) Parties designating supplemental experts must "make those experts available immediately for a deposition" (§ 2034.280, subd. (c).)

Section 2034.300 provides in part: "[O]n *objection of any party* who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has *unreasonably* failed to do any of the following: (a) List that witness as an expert under Section 2034.260." (Italics added.) "We review the trial court's reasonableness determination under section 2034.300 for [an] abuse of discretion." (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

Thus, if a party fails to designate an expert witness under the above provisions, the expert's testimony may only be excluded where (1) the other party objects, and (2) the failure to list the expert was unreasonable. Here, although motions in limine to exclude the expert witness testimony of witnesses who were not properly designated were deemed granted pursuant to the Superior Court of San Diego County Local Rules, rule 2.1.18,

when Officer Cordero offered his opinions counsel for Aquino did not object on the basis that he had not been designated as an expert. That failure to object dooms Aquino's appeal related to an alleged failure to designate Cordero as an expert.

First, because Officer Cordero was a percipient witness, not a retained expert, it is not clear that he was required to be listed as an expert. While certain percipient witnesses who will render expert testimony (such as treating physicians) must be designated (see *Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1418), we have found no authority discussing whether a police officer who investigated a crash must be designated as an expert if he or she is going to render opinions based upon the investigation of the accident. Therefore, if an objection was made, and the court determined Officer Cordero should have been designated, the court may well have found that the failure to designate him as an expert was not "unreasonable." The court also may have found Aquino's failure to object specifically to Cordero's opinion testimony until trial as grounds for finding the failure to designate Officer Cordero was not "unreasonable." (See *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1504 [reasonableness limitation "may prevent parties from waiting until trial to raise objections that could have been raised beforehand. I.e., without notice and opportunity to correct deficiencies before trial, a court may find the failure to comply was not 'unreasonable'"]; *Boston v. Penny Lane Centers, Inc.*, *supra*, 170 Cal.App.4th at p. 954.) This is particularly true as counsel for Aquino had deposed Officer Cordero prior to trial, and thus should have known the substance of his testimony.

Second, if an objection had been made at trial, and the court concluded Officer Cordero should have been listed as an expert, Crucero could have made an application for relief based upon "mistake, inadvertence, surprise, or excusable neglect." (§ 2034.720, subdivision (c)(1).) For example, where a party mistakenly believed an expert witness designation was not required for treating physicians who were expected to give standard of care testimony, and the issue was one of first impression, relief was properly granted on the basis the mistake was not "unreasonable." (*Plunkett v. Spaulding* (1997) 52 Cal.App.4th 114, 137.) In this case as well, as there is no authority holding that investigating officers must be designated as experts and there is no evidence counsel for Crucero was engaged in any type of gamesmanship, it is likely that if presented with the issue, the trial court would have granted Crucero relief from any violation of its expert disclosure obligations.

Third, under Evidence Code section 353, subdivision (a), a judgment cannot be reversed for an improper admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion" Because there was no objection on the ground Officer Crucero was not designated as an expert witness, we cannot review the propriety of Officer Cordero's opinion testimony as an undesignated expert witness.

II. *SUBSTANCE OF OFFICER CORDERO'S EXPERT OPINIONS*

Aquino contends that Officer Cordero's opinion testimony was improper because (1) his opinion that Aquino violated a Vehicle Code section lacked foundation as it was

not based upon his personal observations; (2) he could not testify as to the cause of the accident; and (3) his testimony was based upon inadmissible hearsay statements of a witness. We reject these contentions.

A police officer's opinion is proper when based upon statements of witnesses, rather than personal observations. (*Kastner v. Los Angeles Metro. Transit Auth.* (1965) 63 Cal.2d 52, 58-59 (*Kastner*).) "The expert in any case proper for the reception of expert testimony may give his opinion although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses and included in hypothetical questions put to him. If the case is one for expert testimony, this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the facts while the ordinary juror is not." (*Id.* at p. 58.)

Further, police officers, so long as they demonstrate competence to do so, may render an opinion as to the cause of an accident. (*Kastner, supra*, 63 Cal.2d at p. 57.) For example, in *Hart v. Wielt* (1970) 4 Cal.App.3d 224, the Court of Appeal held that the trial court acted within its discretion in permitting the investigating officer to testify as to his opinion on the reasonable driving speed in the area of the accident. In permitting that testimony, the court "admonished the jury that it was up to the jury to make the final decision as to proper speed and also as to whether [the officer] was qualified as an expert to give his opinion on speed." (*Id.* at p. 229.) Similarly in this case, the court admonished the jury that Officer Cordero's opinion that "Aquino violated the Vehicle

Code does not mean that she's at fault," directing the jury that that ultimate issue was for them to decide.

Further, Officer Cordero's testimony, to the extent based upon the statement of Thompson that he recorded in his report, was not objectionable as inadmissible hearsay. For example, in *Kastner, supra*, 63 Cal.2d 52, the California Supreme Court upheld the admission of expert testimony by an investigating officer as to the point of impact of an accident wherein a bus struck a pedestrian, even though based largely upon statements made by the defendant, because that witness testified to the same facts at trial: "Opinion evidence based on hearsay is inadmissible. [Citation.] [The officer's] opinion, however, although based to a large extent upon [defendant's] statement made outside the courtroom, was not based upon hearsay evidence, because defendant . . . testified on the witness stand to the identical facts which were included in his statement." (*Id.* at p. 58; see also *Arellano v. Moreno* (1973) 33 Cal.App.3d 877, 885-886 [opinion on point of impact proper even where based on statement of defendant where defendant confirmed substance of statement at trial].)

Likewise in this case, Thompson's statement in the police report that Aquino "bolted" from the curb was confirmed in her deposition testimony that was read to the jury at trial. Thus, to the extent Officer Cordero relied on her statement made in the police report in rendering his opinion, that testimony was not inadmissible hearsay.

There is no merit to Aquino's contention his opinion was improper because it was a "legal conclusion" that embraced the ultimate issue the jury was to decide. As the court admonished the jury, Officer Cordero was not opining who was at fault when he opined,

based upon his observations and the statements of witnesses, that Aquino was outside the crosswalk. The jury was not compelled by Officer Cordero's opinion to find the bus driver was not at fault. The jury could have rejected Officer Cordero's opinion or the testimony by Thompson that Aquino was outside the crosswalk. The ultimate question of liability also revolved around whether Aquino "darted" or "bolted" from the curb, whether the pedestrian signal was flashing "Don't Walk," and whether the bus driver was at fault for failing to observe her before she was struck.

Aquino asserts Officer Cordero's testimony was improper because it was based on an out-of-court statement by Thompson that was "unsworn" and "uncross-examined." However, Thompson's deposition was taken and that testimony was consistent with what she told Officer Cordero at the scene.

Aquino asserts Thompson's statement was unreliable and prejudicial because it "was in direct conflict with her subsequent sworn testimony." This claim has no merit. As detailed *ante*, in her deposition testimony Thompson stated Aquino "darted" out into traffic, essentially identical to her statement at the scene that Aquino "bolted" from the sidewalk.

In sum, the court properly allowed Officer Cordero's opinion testimony.

III. ACCIDENT REPORT

Aquino also asserts the court erred by allowing Officer Cordero to testify from the inadmissible traffic accident report and statements and a diagram contained therein. These contentions are unavailing.

In support of her assertion the accident report was inadmissible, Aquino relies on Vehicle Code section 20013, which provides "No *such* accident report shall be used as evidence in any trial, civil or criminal, arising out of an accident." (Italics added.)

However, police and other official traffic accident reports *are* competent evidence at trial, so long as they otherwise are admissible under the rules of evidence. Vehicle Code section 20013, which for many years had been relied on as creating a special rule of inadmissibility, applies only to reports referred to in Vehicle Code section 20008, which are reports a *party* to an injury accident must file. (*Davies v. Superior Court* (1984) 36 Cal.3d 291, 298 [implicitly overruling contrary result in *Box v. California Date Growers Assn.* (1976) 57 Cal.App.3d 266]; *People v. Ansbrosio* (1984) 153 Cal.App.3d 273, 277; *Hodges v. Severns* (1962) 201 Cal.App.2d 99, 106 [predecessor statute did not bar report of investigating officer].)

Further, even where accident reports themselves are inadmissible, their contents are not. (*Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 31.) Accident reports, like other writings, may also be used to refresh a witness's recollection, regardless of their admissibility. In this regard, Evidence Code section 771 permits a witness to use any writing "to refresh his memory with respect to any matter about which he testifies" (See also Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2009) ¶ 9:178, p. 9-35 (rev. #1, 2002) ["Since *anything* can be used to revive a witness' memory, the document shown to the witness need not be admissible in evidence."].)

That is precisely what occurred here. Officer Cordero testified as to his general recollection of the accident. It is only when he testified that he was "drawing a blank" as to the name of the bus driver that counsel used the accident report to refresh his recollection.

Moreover, contrary to Aquino's contention, he was not thereafter allowed to simply read from the report as to what the witness Thompson told him. Rather, counsel for Crucero asked him, "As best as you recall, what did Ms. Thompson tell you?" Nothing in the record indicates that Officer Cordero thereafter was reading from his report when he described what Thompson told him.

Nor did he testify using the diagram in the police report. Rather, when Aquino's counsel objected to him using that diagram to render an opinion as to the point of impact, he indicated he would withdraw the objection so long as Officer Cordero used a board to diagram the point of impact based upon his recollection. Officer Cordero then proceeded to diagram the point of impact using the board. Officer Odom thereafter diagrammed the point of impact on the board, based upon his recollection, not upon the diagram in the police report.

IV. ADMISSION OF EVIDENCE OF PRIOR ACCIDENT

Aquino asserts the court abused its discretion under Evidence Code section 352 by allowing evidence of a prior accident she was involved in 1998. This contention is unavailing.

A. Background

In a motion in limine, Aquino requested, under Evidence Code section 352, that no reference be made to her 1998 motor vehicle accident or her injuries and treatment, arguing the injuries she suffered in the prior accident had no relationship to the head injuries at issue in this case, and the evidence would be extremely prejudicial. Crucero opposed the motion, arguing the evidence was relevant to Aquino's credibility and veracity as she denied having been involved in any prior accidents in response to interrogatories, in her deposition testimony, and in response to questioning by the defense psychiatrist, Doctor Mark Kalish. Crucero argued the evidence was also relevant because in both accidents she claimed to have lost consciousness.

The court denied the motion, finding that, given Aquino's denials concerning the prior accident during discovery, the evidence was relevant to her veracity. The court reserved its ruling on the admissibility of evidence that when she was treated for the prior accident she used a false name and passport.

At trial, Aquino's medical experts both testified that when she was examined by them, she revealed to them the 1998 accident. However, the defense psychiatrist, Dr. Mark Kalish, testified that when he examined her, she denied that she had been involved in a prior accident.

A. Analysis

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its

admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' ' ' (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

The court did not err in allowing the introduction of evidence of Aquino's prior automobile accident. Because she revealed her prior accident to her treating doctors, but failed to inform Crucero about the crash during discovery, Crucero was entitled to argue that she withheld information concerning prior injuries in order to exaggerate her claimed injuries in this case. The prior accident was particularly relevant given that she told her treating doctors in the previous accident that she had lost consciousness, and a major portion of her claimed injuries in this case were alleged brain injuries.

Because this evidence went to Aquino's credibility, and demonstrated a possible attempt to suppress evidence, it was highly relevant. Evidence Code section 413 provides that, "[i]n determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . wilful suppression of evidence relating thereto" "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*" ' ' ' (*Shapiro v. Equitable Life Assurance Soc.* (1946) 76 Cal.App.2d 75, 94; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation At Trial, § 116, pp. 155-156; CACI No. 204.)

Aquino asserts that admission of her medical records that showed she was using a different name "invited the jury to speculate that insurance fraud or even more criminal conduct was involved." However, there was no evidence or argument Aquino was involved in insurance fraud or other criminal conduct. Thus, the court did not abuse its discretion in allowing evidence of her prior automobile accident.

In sum, the court did not abuse its discretion in allowing evidence of Aquino's prior automobile accident.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.